***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S REPLY BRIEF

ORIGINAL 77-7249

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

# United States Court of Appeals
FOR THE SECOND CIRCUIT

THE SPRAGUE & RHODES COMMODITY CORP.,
*Plaintiff,*

*against*

S. S. TORONTO, her engines, etc., WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES, A/S,
*Defendants, Third-Party Plaintiffs-Appellees,*

*against*

PITTSTON STEVEDORING CORP.,
*Third-Party Defendant-Appellant.*

ON APPEAL BY THIRD-PARTY DEFENDANT FROM FINAL JUDGMENT IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS AGAINST THIRD-PARTY DEFENDANT

## REPLY BRIEF FOR PITTSON STEVEDORING CORP., THIRD-PARTY DEFENDANT-APPELLANT

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## REPLY BRIEF FOR PITTSON STEVEDORING CORP., THIRD-PARTY DEFENDANT-APPELLANT

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## POINT I

**Barber's submission that (1) it did not preclude itself from relying on an implied warranty and (2) the release did not include this lawsuit is wrong.**

In its brief Barber urges "the issue of whether a shipowner has precluded itself from relying on a warranty is an issue of fact", citing *Hurdich* v. *Eastmont Shipping*

*Corp.*, 503 F. 2d 397, 401 (CA 2, 1974) "which can only be overturned if clearly erroneous," citing *McAllister* v. *United States*, 348 U.S. 19 (1954). (Barber's brief at pp. 23, 24). Pittston submits that the *Hurdich* rule is not applicable in the facts here. If it is applicable, equity requires that the determination of the court below be reversed as clearly erroneous.

It is undisputed:

(1) The coffee weighers, W.S. Force & Co. and (2) truckers, Davidson Transfer & Storage Co., employed by the plaintiff (313a, 314a), and Pittston made a mistake (176a, 189a) with respect to 1,111 bags of the coffee delivered on 27 and 28 September 1971. Davidson recognized the error on 28 September 1971 and was going to return the 1,111 bags that were still in its trucks at Elizabeth, N.J. to Pittston. Barber stopped Davidson from returning the bags and put them into Lehigh Warehouse at Elizabeth. Although it had signed a receipt in the delivery book, neither Davidson nor its principal, the plaintiff, ever advised Pittston that the 1,111 bags were turned over to Barber at Lehigh. Barber kept the coffee at Lehigh and paid the warehousing charges. Barber did not tell Pittston that it had stored the 1,111 bags at Lehigh or tell Pittston that it had delivered the 1,111 bags to Carl Borchsenius until 1 July 1976, during the trial below. Barber avoided and frustrated the generally accepted delivery procedure maintained by Pittston by (1) taking possession of the 1,111 bags and (2) delivering the 1,111 bags directly to Carl Borchsenius so that the delivery was neither recorded nor signed for in the delivery book. The plaintiff, by its agents, actually signed the delivery book kept by Pittston for the receipt of 2,093 bags out of its total shipment of 2,099 (Exh. 54, 605a, 606a). Pittston was not advised by anyone until the trial below that the cross-delivery involved 1,111 bags consigned to Carl Borchsenius nor was Pittston

advised before the trial that the 1,111 bags were delivered by Barber to Carl Borchsenius. In fairness, the claim of Barber against Pittston should be estopped because of Barber's interfering with the generally accepted delivery procedure and usurping Pittston's delivery role.

Barber also urges in its brief "Parol evidence was properly received and the Court correctly held, *as a finding of fact,* that the release did not include the lawsuit now before the bar" (Barber brief, p. 30). Pittston submits that the release was unambiguous and that parol evidence should not have been received. *Locafrance U.S. Corporation* v. *Intermodal Systems Leasing, Inc.,* No. 76-7612, Slip opinion (CA2, decided 21 July 1977). If the parol evidence was properly received, the determination of the court below should be reversed as clearly erroneous.

It is uncontroverted:

On 28 September 1971, Davidson, plaintiff's agent, reported to Barber the cross-delivery of 1,111 bags (155a, 156a). Barber received a written notice of plaintiff's intent to file a claim on or about 15 October 1971 (Exh. 11, 313a). On or about 9 December 1971 Barber discussed the problem of the cross-delivery with plaintiff's surveyor. On or about 13 December 1971, Barber was invited by plaintiff's surveyor to participate in a survey regarding the cross-delivery and declined the invitation (102a, 111a). On or about 22 December 1971 plaintiff's surveyor again discussed the matter with Barber (113a, Exh. 16, 321a). On or about 26 January 1972 Barber received a formal claim from the plaintiff (Exh. 13, 315a). At the suggestion of plaintiff's surveyor Barber issued a blank open delivery order to bypass the delivery book and prior to 2 February 1972, the plaintiff took delivery of 390 bags of Gimbi coffee which was not recorded in Pittston's delivery book (104a, 105a, Exh. 17, 325a, 326a). Prior to 28 March 1972 the delivery records

were turned over by Pittston to Barber (211a). On 28 March Barber replied to plaintiff's claim, enclosing copy of delivery records, and suggesting "an amended claim covering the loss of eight bags plus outages from 47 slack bags." (Exh. 14, 316a; Exh. 65, 681a). On 3 August 1972 the plaintiff sued Barber in the Court below. On 13 November 1972 Barber released Pittston from any other cargo claims filed against [Barber] up to November 13, 1972. At the time Barber gave Pittston a release, 13 November 1972, Pittston had no knowledge of plaintiff's claim or of the plaintiff's pending suit against Barber in the Court below. On 9 April 1973 Barber filed a third party complaint against Pittston in the Court below. In fairness, the determination of the Court below varying the clear, unambiguous settlement agreement between Barber and Pittston should be reversed.

## CONCLUSION

**The judgment should be reversed and the third-party complaint dismissed.**

Respectfully submitted,

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